

7-5-2017

State v. Savell Respondent's Brief Dckt. 44541

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LAWRENCE G. WASDEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

KENNETH JORGENSEN
Deputy Attorney General

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44541 & 44579
Plaintiff-Respondent,)	
)	Kootenai County Case No.
v.)	CR-2016-6233 & 2016-12936
)	
JUSTIN TYLER SAVELL,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Savell failed to establish the district court abused its discretion, either by imposing concurrent unified sentences of 10 years, with five years fixed, for two counts of grand theft by possession or by denying his Rule 35 motion for reduction of sentences?

Savell Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Savell pled guilty in case 44541 and case 44579 to grand theft by possession in each case, and the district court imposed concurrent, unified sentences of 10 years, with five years fixed. (44541 R., pp.63-65, 44579 R., pp.65-67.) Savell filed a notice of

appeal timely from the judgement of conviction in both cases. (44541 R., pp.68-71, 44579 R., pp.68-71.) He also filed a timely Rule 35 motion for reduction of his sentences, which the district court denied. (Aug. R., pp.1-2, 6-7, 8-9, 13-14.)

Savell asserts his sentences are excessive in light of his age, not having any prior felony convictions, poor health, purported remorse, and acceptance of responsibility. (Appellant's brief, pp.5-7.) The record supports the sentences imposed.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution. Id. The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds

might differ.” McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, “[a] sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

The maximum prison sentence for grand theft by possession is up to 14 years. I.C. § 18-2408(2)(a) The district court imposed concurrent unified sentences of 10 years, with five years fixed, which fall well within the statutory guidelines. (44541R., pp.63-65, 44579 R., pp.65-67.) Savell asserts that the district court did not take into consideration his lack of prior felony convictions. (Appellant’s brief, p. 3.) However, Savell’s thefts resulted not only in two convictions for grand theft in Idaho, but also nine felony counts of trafficking stolen property in the state of Washington. (PSI, pp.10-12.) He stole over 100,000 pounds of aluminum valued at nearly \$60,000 from a former employer. (PSI, pp. 10-11.) Savell did not merely make a one-time error at odds with his character.

Savell asserts he is not in good health due to his claim of being diagnosed with stomach cancer. (Appellant’s brief, p.6.) However, although he did indicate he was diagnosed with stomach cancer and is undergoing treatment, he also stated his health was “good” and does not have “any physical or mental health limitations.” (PSI, p.16.) In Savell’s GAIN evaluation he reported to be in “very good” health, and that his health problems did not keep him from meeting his responsibilities. (PSI, p.56.)

Finally, Savell asserts that he is young, remorseful, and has taken responsibility for his actions. (Appellant’s brief, pp.6-7.) However these factors do not outweigh the crimes he has committed. At sentencing, the district court set forth its reasons for

imposing Savell's sentence stating, "And then, finally, there's public safety, and public safety is the factor that we take into consideration at the highest degree, and this case screams out for public safety. You are making the public your victim with your conduct, and it really causes me a lot of concern." (9/8/16 Tr., p.14, Ls. 2-7.) The state submits Savell has failed to establish an abuse of discretion.

Savell next asserts the district court abused its discretion by denying his Rule 35 motion for reduction of his sentences in light of attending programming classes and religious meetings, his crimes happening at the same time, and his substance abuse issues. (Appellant's brief, p.7-10.) If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this Court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Savell must "show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id. Savell has failed to satisfy his burden.

Savell provided no "new" information in support of his Rule 35 motion. He merely argued that his sentence should be reduced in light of his substance abuse issues and that his crimes were "like a crime spree." (Appellant's brief pp.8-10.) Because Savell's alcohol addiction existed before sentencing, it is not "new" information. Moreover, Savell represented he had no problem with alcohol abuse to the presentence investigator and GAIN evaluator. (PSI, pp.16-17, 56.) Rule 35 functions to allow a defendant to request leniency in light of "new or additional" information. Huffman, 144 Idaho at 203, 159 P.3d at 840. Claims Savell had an alcohol abuse problem were

available at the time of sentencing, but were intentionally withheld. (1/13/17 Tr., p. 19, L. 20 – p. 20, L. 20, L. 7.) It would indeed be ironic to allow a defendant to try one strategy at sentencing (not having an alcohol abuse problem) but then submit a factually incompatible strategy on reconsideration (I do have an alcohol abuse problem). In addition, evidence that the crimes took place between November of 2014 and March of 2016 was before the court at the time of sentencing. (PSI, pp.10-11, 44541 R., pp.36-38, 44579 R., pp.55-57.) Finally, the district court did not abuse its discretion by concluding Savell's claims of attending programming and religious services did not warrant a reduction in of his sentences. (1/13/17 Tr., p. 21, Ls. 14-17.) The state submits that by failing to establish that the district court abused its discretion by denying his Rule 35 motion, Savell has failed to establish any basis for reversal of the district court's order denying his Rule 35 motion.

Conclusion

The state respectfully requests this Court to affirm Savell's convictions and sentences and the district court's order denying Savell's Rule 35 motion for reduction of sentences.

DATED this 5th day of July, 2017.

/s/ Kenneth Jorgensen
KENNETH JORGENSEN
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of July, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kenneth Jorgensen
KENNETH JORGENSEN
Deputy Attorney General